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IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1935.

No. 34

Borax Consolidated, Limited, a corporation, and Pacific Coast Borax Company, a corporation,

Petitioners,

vs.

The City of Los Angeles, a municipal corporation,

Respondent.

REPLY TO PETITION FOR REHEARING.

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REPLY TO PETITION FOR REHEARING.

The petitioners set forth in their petition as grounds for a rehearing two points, the first of which is that the court should have decided whether, as a matter of state law, the neap line is the boundary line of Mormon Island even though the federal grant *ex propria vigore* extends only to mean high tide line.

This Honorable Court very clearly and definitely pointed out that tidelands, title to which was vested in the State of California, extend to high water mark [Opinion 9]; that high water mark is not a physical mark made on the ground by the water—"it means the line of high water as determined by the course of the tides".

The court also pointed out that ordinary high water mark is not the line of the neap tides nor the mean of those tides—"it is the mean of all high tides" [Opinion 12].

The petitioners have at all times contended that the boundary between tideland and upland was "ordinary high water mark". They contended that ordinary high water mark was either a physical mark on the ground or the line of the neap tides. The court very clearly pointed out that the line of the neap tides is not the boundary line between tideland and upland.

The patent to Banning extends to the boundary line between tideland and upland. This Honorable Court held [Opinion 8]: "The question as to the extent of this federal grant, that is, as to the limit of the land conveyed, or the *boundary between the upland and the tideland,* is necessarily a federal question. It is a question which concerns the validity and effect of an act done by the United States; it involves the ascertainment of the essential basis of a right asserted under federal law." (Italics ours.) Petitioners do not complain of this ruling as indeed they could not.

Petitioners allege in the petition for removal of the action from the state court to the federal court that one of the grounds for removal of said action to the federal court is "that the cause has arisen under the laws of the United States and necessarily involves the construction of said laws and the validity of acts done pursuant thereto". [R. 15.] The petitioners, in their brief in support of their petition for a *writ of certiorari* (p. 50) and in their opening brief (p. 100), argue and cite authorities in support of their argument that the question as to what line constitutes the boundary line between tideland and upland is

"a federal question". We concede that petitioners' contention in this regard is correct. This Honorable Court has pointed out that the boundary between tideland and upland is the line of mean high tide of the Pacific Ocean *and not the line of the neap tides as contended for by petitioners,* and pointed out that the extent of the federal grant to Banning and the question as to what line constitutes the boundary line between tideland and upland is a federal question, and stated that it was unnecessary for this court to decide whether or not the courts of California had finally passed upon the question as to what line constitutes the boundary line between tideland and upland.

The decision of this court that tidelands, title to which belongs to the state of California, extend to the line of mean high tide and, that the boundary line is not the "neap high tides or the mean of those tides, is a very definite decision that the neap tide rule is not controlling in California; and we therefore submit that the question as to whether or not the neap rule is controlling in California has not been, as stated by petitioners (Petition 6), "eliminated from the court's decision" in the case at bar.

The opinion of the court on all of the points involved in this action is so clear, and the direction to the trial court as to the method to be followed in fixing and locating the boundary line between the upland belonging to petitioners and the tideland belonging to the respondent is so specific, that there can be no danger of a misinterpretation thereof as contended by petitioners (Petition 6). In the last paragraph on page 6 of the petition petitioners refer to the decision of this court in "directing the trial court to determine petitioners' rights according to the mean high tide line." This demonstrates that there is

no misinterpretation of the decision, at least so far as petitioners are concerned.

In the same paragraph petitioners state that in directing the trial court to determine petitioners' rights according to the line of mean high tide the court "has inadvertently and unintentionally narrowed the issues". It is evident that the decision of the court in determining the boundary line between tideland and upland as the line of mean high tide of the Pacific Ocean was not "inadvertently and unintentionally" made. This is evident from the fact that this Honorable Court affirmed the decision of the Court of Appeals in directing the trial court as to the method to be followed in ascertaining the line of mean high tide as the boundary line between the tideland belonging to the respondent and the upland belonging to the petitioners.

The question as to what line constitutes the boundary line between tideland and upland being a federal question, it would be and is immaterial as to whether or not the California courts have finally passed upon the question. It being a federal question, the decision of the state court would not be binding upon this Honorable Court. Not that the decisions of the courts of California on this question are binding on this Honorable Court, but, in view of the contention advanced by petitioners in their petition for a rehearing, it is interesting to note that the California courts have definitely and finally determined that the boundary between tideland and upland is the "line of mean high tide" of the Pacific Ocean. (See *Los Angeles v. San Pedro etc. R. R. Co.*, 182 Cal. 652, 658, 663; *Miller & Lux v. Secara*, 193 Cal. 755, 761, 762; *City of Los Angeles v. Duncan*, 130 Cal. App. 11, 14.)

Petitioners state (Petition 5) that it is necessary for the court to determine whether the California courts have determined that the neap line is the limit of the state's claim to tideland. The court pointed out that upon the admission of the state of California into the Union title to all tidelands within its boundaries, save and except such tidelands as were the subject of prior grants, passed to said state. The court also pointed out [Opinion 9] that the "tideland extends to high water mark".

Petitioners also state (Petition 5) "the question still remains of the extent to which, if at all, the state of California has chosen 'to resign to the riparian proprietor rights which properly belong'" to the state of California by virtue of its sovereignty. At no time have the petitioners contended that they have acquired title, or any interest, in or to the disputed area from the state of California. Their claim of ownership to the disputed area is based entirely on the federal patent to Banning. Now that it has been definitely determined that the patent to Banning did not extend beyond the boundary between tideland and upland, to-wit, the line of mean high tide of the Pacific Ocean, and that petitioners acquired from Banning only the upland on Mormon Island the petitioners contend at this late date that they have acquired title to the disputed area from the state of California.

The question as to whether or not the state of California has relinquished its claim to its tidelands is not an issue in this case for the reason that petitioners have never contended that they acquired title to or any interest in or to, the disputed area from the state. No such claim could be successfully made by petitioners. The state of California is now and has been at all times subsequent to January 1, 1880, prohibited from granting or convey-

ing to the petitioners or to any individual, partnership, or private corporation, title to, or any interest in and to, the tidelands involved in this action. The constitution of the state of California, to-wit, section 3 of Article XV, effective January 1, 1880, prohibits the state of California from granting to private persons, partnerships, or corporations, any tidelands within two miles of an incorporated city fronting on the waters of any harbor, estuary, bay, or inlet used for the purpose of navigation. Therefore, petitioners could not have acquired title to any of the tideland on Mormon Island, or any interest therein, from the state of California. Even had the state attempted to convey to the petitioners the tideland involved in this action, or any interest in and to said land, such act would have been absolutely void. This point has been definitely settled by the decision of this court in the case of *Banning v. California,* 240 U. S. 140. See, also, *People v. California Fish Co.,* 166 Cal. 576, 603, 609; and *Ross v. Burkhard Investment Co.,* 90 Cal. App. 201, 205. The fact that the state of California could not grant or convey to petitioners title to, or any interest in and to, the tidelands involved in this action disposes of petitioners' contention (Petition 5) that "the question still remains of the extent to which, if at all, the state of California has chosen 'to resign to the riparian proprietor rights which properly belong'" to the state by virtue of its sovereignty. The fact that the state of California granted to respondent all tideland and submerged land, whether filled or unfilled, below "the line of mean high tide" of the Pacific Ocean (Calif. Stats., 1911, p. 1256; 1917, p. 159) conclusively shows that the state had not relinquished its ownership or any of its rights in or to the tideland involved in this action, and neither had it "resigned to

the riparian proprietor" any of its rights in and to said lands.

In addition to the above, petitioners claim to have acquired title to the disputed area in the month of April, 1923, [R. 98, 99]. The federal grant to Banning extended only to the line of mean high tide of the Pacific Ocean. The state granted to the respondent in the year 1911 all tideland below "the line of mean high tide". How then could the petitioners have acquired from the state of California title to, or any interest in and to, the tideland involved in this action in the year 1923, or at any time thereafter?

The second point urged by the petitioners is, "The theory upon which *Knight v. United Land Association*, 142 U. S. 161, was differentiated in the instant opinion is untenable because based upon a misapprehension of its controlling fact":

This Honorable Court has, by an unbroken line of decisions beginning with the case of *Pollard v. Hagan*, 3 How. 212, decided again and again that upon the admission of a state into the Union title to all tidelands, save and except such as may have been the subject of a prior grant, passed to the state in which the tideland was located. Petitioners concede this to be the rule and concede that title to all tidelands in California, save and except such tidelands as may have been the subject of a prior grant, passed to the state upon its admission into the Union, but contend that the question as to whether or not the land involved in this action was tideland is foreclosed by a survey made by the Federal Land Department, although the survey is erroneous. The petitioners rely entirely upon the case of *Knight v. United Land Association*, 142 U. S.

161, in support of their contention hereinabove referred to.

This Honorable Court so clearly pointed out in its opinion in the case at bar why the *Knight* case is not applicable to the facts in this case, that we hesitate to comment further regarding the facts in that case. However, in view of the fact that counsel for petitioners again urge the *Knight* case as authority in support of their contention that the survey and patent is conclusive, we deem it appropriate to reply thereto.

Counsel for petitioners brush aside the important and controlling facts in the *Knight* case which distinguish that case from the case at bar. Counsel for petitioners argue that the fact that the tideland in the *Knight* case, together with other land, was the subject of a Mexican grant prior to the date of the admission of the state of California into the Union, is wholly immaterial. Counsel for petitioners have completely overlooked or ignored the fact that in the *Knight* case the grant to the pueblo of San Francisco was for a tract of land "bounded on the north and east *by the bay of San Francisco* (italics ours); on the west by the Pacific Ocean, and on the south by a due east and west line drawn so as to include the area aforesaid". The important part of the description of this boundary line is the part which is described as the "bay of San Francisco". The court, in the *Knight* case, stated, "Said tract being bounded on the north and east by the bay of San Francisco; on the west by the Pacific Ocean, the tract bounds upon the *bay* and *ocean, not upon estuaries, creeks and streams intersecting such tracts,* even though they be navigable and technically termed arms of the sea. The boundary, he (Secretary of the Interior) added, was not the stream but the bay; consequently the

ordinary high water mark must be the high water mark of the shore as pertaining to the sea, *not the high water mark of the bank as pertaining to a river or stream.*" (Italics ours.) The grant as confirmed was described in the decree of confirmation as hereinabove set forth. Subsequent to the entry of the decree of confirmation a survey was made for the purpose of locating on the ground the boundary of the grant as confirmed and as described in said decree of confirmation. The survey which was made by Stratton *did not* follow the description as set forth in the decree, to-wit, the bay of San Francisco, but on the contrary when he—Stratton—came to Mission Creek he followed the tideline up Mission Creek and crossed over and ran down the other side. This survey was set aside by the Secretary of the Interior for the reason that the boundary of the grant as located by the surveyor Stratton was not in accordance with the decree of confirmation. A new survey was made by one Von Liecht, who located on the ground the boundary of the grant as described in the decree of confirmation. This survey was approved and a patent issued for the land described in the decree.

As stated by the court in the case at bar [Opinion 7, 8], "The survey upon which the patent rested in the *Knight* case was thus made pursuant to the authority reserved to the United States to enable it to discharge its international duty with respect to land which, although tideland, had *not* passed to the state." (Italics ours.)

The important fact in the *Knight* case which distinguishes that case from the case at bar is the fact that the tideland involved in the *Knight* case was the subject of a Mexican grant prior to the admission of the state of California into the Union, and therefore the state of Cali-

fornia never acquired title to said land. The title of the state of California was in abeyance until such time as the private land claims had been adjudicated by the land commission which had been created by act of Congress for the purpose of settling the question of ownership of grants of lands which had been previously made by the former government.

Mormon Island was never included in any grant by the government of Mexico and therefore upon the admission of the state of California into the Union title to all tideland on Mormon Island passed from the United States, and the Land Department no longer had jurisdiction over the same.

Petitioners state (Petition 8) that there is nothing in the *Knight* case which tends to indicate that Mexico had attempted to make any grant of tideland to the pueblo of San Francisco. The grant to the pueblo of San Francisco, including the tideland along Mission Creek, was duly and regularly confirmed. This court held that the tideland along Mission Creek was included in the Mexican grant to the pueblo. Therefore, we submit, Mexico not only "attempted" to grant to the pueblo tidelands, but did in fact grant to the pueblo all of the tidelands within the exterior boundary of the grant.

Petitioners also state that the language in the case of *San Francisco v. Le Roy*, 138 U. S. 656, a case which this court in the *Knight* case and also in the case at bar designated as a case "directly in point", wherein the court re-

ferred to the fact that Mexico had granted certain tidelands to the pueblo of San Francisco, was *"dictum,* or at best *arguendo"* (Petition 8). The court, in speaking in reference to the grant by Mexico of the tidelands to the pueblo of San Francisco and the rights of the pueblo to such lands by reason of the grant, in the *LeRoy* case, "Its (San Francisco's) rights were dependent upon Mexican laws, and when Mexico established those laws she was the owner of tidelands as well as uplands, and could have placed the boundaries of her pueblos wherever she thought proper. It was for the United States to ascertain those boundaries when fixing the limits of the claim of the city, and that was done after the most thorough and exhaustive examination ever given to the consideration of the boundaries of a claim of a pueblo under the Mexican government."

Petitioners state (Petition 8, 9) that the reason the grantee was foreclosed from showing that the land involved in the *Knight* case was in fact tideland, was that the Land Department had jurisdiction to survey the land which had been granted to the pueblo. The survey in the *Knight* case followed the decree of confirmation and was made for the purpose of locating on the ground the boundary of the grant as described in the decree. The pueblo of San Francisco acquired title to the tideland not by reason nor by virtue of the survey of the Land Department, but by virtue of the prior Mexican grant which was duly and regularly confirmed by the proper tribunals of the federal government. In the *LeRoy* case the court

said, in speaking in reference to the title acquired by the pueblo of San Francisco:

> "The title of the city therefore rests upon the decree of the court recognizing its title to the four square leagues, and establishing the boundary, and the confirmatory acts of Congress."

See, also:

Shively v. Bowlby, 152 U. S. 1, 47.

Counsel for petitioners state that the present action does not involve "a controversy as to title". The action involves the question of the ownership of a tract of tideland situated between the mean high tide of the Pacific Ocean and the traverse lines of the Norway survey. The question is, as stated by the petitioners on page 4 of the petition for rehearing, "Who owns the disputed area?" and as stated by the court in referring to the disputed area [Opinion 6], "Was it upland, which the United States could patent, or tideland, which it could not?"

Counsel for petitioners also criticize the statement of this Honorable Court, "Here the question goes to the existence of the subject upon which the Land Department was competent to act." [Opinion 6.] If the disputed area was tideland the Land Department had no jurisdiction over the same, as its jurisdiction is limited to such lands as are "subject to sale or other disposal under general laws", and, further, tidelands are not "public lands" within the meaning of the statutes conferring jurisdiction upon the Land Department to sell or otherwise dispose

of public lands. We submit that the question involved is a judicial question—one to be determined by the courts. As stated by the court [Opinion 5], "questions of that sort 'may be considered by a court of law' for in such cases 'the objection to the patent reaches beyond the action of the special tribunal, and goes to the existence of a subject upon which it was competent to act'." A determination of the questions involved herein by an administrative board or officer would not foreclose judicial inquiry. (Resp. Br. pp. 49-55.)

We respectfully submit that the petition for a rehearing should be denied.

Respectfully submitted,

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